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Wills -- Acts Constituting Election

Cecil J. Hill

had control of the agency, and the accident might have resulted from one of several causes, for some of which the defendant would not be liable.[31*] When a customer places himself within range of a swinging door, he subjects himself to the probability of being hit by it if someone has just passed through it. It would be unreasonable to conclude that the storekeeper was in exclusive control of such an instrumentality. The reasoning of these cases applies to the facts of the recent North Carolina case.[32] Could it be fairly said that the storekeeper in the instant case was in exclusive control of the opening and closing of the "magic eye" door, when such door is known to remain motionless until the light beam between the electric eyes (which cause the door to operate) is broken by an incoming or outgoing patron? The proposition expressed in the swinging door cases above, *i.e.*, that third persons are in control of the door rather than defendant, would seem to apply to cases of doors operated by the magic eye.

In the instant case a railing separated ingoing and outgoing customers. The right hand door was marked "IN" and there was a rope on the outside of the left hand door to indicate that it was not the entrance. The plaintiff's carelessness in not keeping to the right and using the door marked entrance presents an inference of negligence which would also preclude the application of the doctrine. It is submitted that the Supreme Court reached the correct result.

JAMES G. HUDSON, JR.

Wills—Acts Constituting Election

In the recent case of *Perkins* v. *Isley*[1] testatrix devised all her property to defendant and appointed plaintiff as executor. Plaintiff was declared mentally incompetent, and defendant requested the clerk of court to appoint an administrator *c. t. a.* The administrator was ap-

[31*] Olson v. Swan, 203 Cal. 206, 263 Pac. 518, 58 A. L. R. 129 (1928) (The doctrine of *res ipsa loquitur* was not applicable in case of injury to a patron of a store by the rebound of a swinging door when she was holding its companion open for another customer to pass through, where the equipment is standard and includes checking devices.); Home Public Market v. Newrock, 111 Colo. 428, 142 P. (2d) 272 (1943) (Plaintiff was injured by the breaking of a glass panel in swinging door under pressure of his hand.); Wiedanz v. May Dept. Store Co., —— Mo. App. ——, 156 S. W. (2d) 44 (1941) (Where plaintiff, attempting to enter defendant's store through revolving door, was knocked down by a woman hit by the door which was pushed by a man, it was held that there was no proximate cause as to the defendant.); Farina v. First Nat. Bk., 72 Ohio App. 109, 51 N. E. (2d) 36 (1943) (Patron departing from bank was injured by collapse of revolving door. It was held that *res ipsa loquitur* did not apply.). *But cf.* Crump v. Montgomery Ward & Co., Inc., 313 Ill. App. 151, 39 N. E. (2d) 411 (1942) (The store's door was equipped with a plunger door check, and plaintiff was struck by the metal bar of the door which had been held open by the door stop but suddenly closed as customer entered the store. It was held that *res ipsa loquitur* was applicable.).

[32] *Supra* note 1.

[1] 224 N. C. 793, 32 S. E. (2d) 588 (1945).

pointed and entered into the duties of office. Three months later defendant filed a petition renouncing her rights under the will and alleging that she wished to take by intestate succession along with the plaintiff, her brother. In an action for partition instituted by plaintiff's guardian, the defendant contends that her renunciation amounted to a conveyance made without the written assent of her husband. The jury found the plaintiff and defendant to be tenants in common. On appeal the court sustained this holding, saying that defendant was under no obligation to make an election and her request to appoint an administrator *c. t. a.* did not estop her from renouncing her rights under the will. But defendant did make a valid renunciation of her rights under the will by filing the petition with the Clerk of Court. Such a right is a natural one and needs no statutory authorization.

An election under a will consists of the exercise of a choice offered the devisee of accepting the devise and surrendering some right of his which the will undertakes to dispose of, or of retaining such right and rejecting the devise. The choice is compulsory between two inconsistent rights or claims where there is a clear intention of the testator that the beneficiary shall not enjoy both;[2] but it must appear that the testator intended an election to be made before the acts of the devisee will constitute an election.[2a] As applied to a will, the doctrine simply means that one who takes under such will must conform to all its legal provisions.[3]

There may be an election either (1) by express declaration showing the intention of electing, or (2) by implication. If the election is by express declaration, little difficulty is experienced in determining whether an election has been made. It is where the election is impliedly made that the difficulty lies. Since election is based on the intention of the parties, testator and devisee, it is difficult to lay down set rules as to what constitutes an election; rather the facts of each particular case control.

In the first place, a devisee is entitled to know the condition of an estate before making an election.[4] Therefore, an agreement to abide by a will made without sufficient knowledge on which to base an intelligent judgment as to the best course to pursue will not estop a widow from making a later dissent.[5] Furthermore, a devisee must know an election is necessary in order to be bound by acts which ordinarily would constitute an election.[6] Especially is this true where the other parties

[2] Wright v. Wright, 198 N. C. 753, 153 S. E. 321 (1930); Note (1937) 110 A. L. R. 1317; EATON ON EQUITY (2nd ed. 1923) §65; 28 R. C. L., WILLS, §361.

[2a] *In re* O'Rourke's Estate, 106 Vt. 327, 175 Atl. 24 (1934).

[3] McGehee v. McGehee, 189 N. C. 558, 127 S. E. 684 (1925).

[4] *See* Richardson v. Truby, 250 Ill. 577, 580, 95 N. E. 971, 973 (1911).

[5] Richardson v. Justice, 125 N. C. 409, 34 S. E. 441 (1899).

[6] Johnson v. Ellis, 172 Ga. 435, 158 S. E. 39 (1931); Wible v. Ashcraft, 116 W. Va. 54, 178 S. E. 516 (1935).

affected by such election can be placed substantially in the same position as if there had been no election.[7]* But once a valid election is made, there can be no dissent.[8]

Under the older cases dower was a favorite of the law, and the courts were quick to overlook acts which would usually constitute an election under ordinary circumstances in an effort to provide for the widow.[9]* Too, at common law there was a presumption of the acceptance of the most beneficial estate.[10]

An implied election to take under a will can be shown in many ways. Foremost is a failure to dissent from the will. In those states having statutes controlling election, usually a limited time is allowed for the widow to dissent;[11] and a failure to dissent within the time prescribed estops the widow from electing to take dower.[12]* Election in such fashion operates in the nature of estoppel or on the basis of laches.[13] Too, an election made by a failure to dissent from a will is a personal one,

[7]* Ludlum v. Roth, 126 N. J. Eq. 556, 10 A. (2d) 648 (1940); Waggoner v. Waggoner *et al.*, 111 Va. 325, 68 S. E. 990 (1910) (Widow held property belonging to her husband's estate in ignorance of the fact that if she took under the will she would relinquish her rights to other property. *Held,* to be no election.).

[8] Pirtle v. Pirtle, 84 Kan. 782, 115 Pac. 543 (1911).

[9]* Ramsour v. Ramsour, 63 N. C. 231 (1869) (Widow had conveyed land in payment of her personal debts.). *But see* Shuette v. Bowers, Com'r of Int. Rev., 32 F. (2d) 817 (1929) (Where a husband willed his entire property to his wife and she sold part of the realty without an admeasurement of dower, such act constituted an election. It is to be noted that this is a tax case which raised the question of a deduction allowed for the widow's dower rights under the estate tax.).

[10] Merrill v. Emery, 27 Mass. (10 Pick.) 507 (1830); Yawger's Ex'r v. Yawger *et al.*, 37 N. J. Eq. 216 (1883).

[11] ALA. CODE (1940) tit. 61, §§18-21; COLO. STAT. ANN. (Michie, 1935) c. 176, §37; FLA. STAT. ANN. (1944) tit. 41, §731.33; GA. CODE ANN. (Park, Skillman, Strozier, 1936) §37-502 through §37-504 (legatee), §113-819 (widow); ILL. REV. STAT. ANN. (Smith-Hurd, 1935) c. 41, §§10-13; IND. STAT. ANN. (Burns, 1933) §6-2332 through §6-2336; IOWA CODE (1939) §12007-12011; KAN. GEN. STAT. ANN. (Corrick, 1935) §§22-245 to 22-248; KY. REV. STAT. ANN. (Cullen, 1942) §392.080; ME. REV. STAT. (1930) c. 89, §13, §14; MD. ANN. CODE (Flack, 1939) art. 93, §314; MASS. ANN. LAWS (1933) c. 191, §15; MICH. STAT. ANN. (Henderson, 1938) §§26.234-26.235; MINN. STAT. (Henderson, Kennedy & Scott, 1941) §525.191; MO. REV. STAT. ANN. (1942) §325-330; MONT. REV. CODES ANN. (Anderson & McFarland, 1935) §§5819-5820; NEB. COMP. STAT. (1929) §30-107, §30-108; N. H. REV. LAWS (1942) c. 359, §§10-14; DECEDENT ESTATE LAW (N. Y.) §18(7); N. C. GEN. STAT. (1943) §30-1 to §30-3, §31-42; OHIO GEN. CODE ANN. (Page, 1937) §10504-56 to §10504-58; OREGON COMP. LAWS ANN. (1940) §17-113, §17-114; PENN. STAT. (Purdon, 1930) tit. 20, §264, §265; R. I. GEN. LAWS (1938) c. 556, §21; TENN. CODE ANN. (Williams, 1934) §§8358-8364; UTAH CODE (1943) §101-1-4; VT. PUB. LAWS (1933) §2965; VA. CODE (1942) §5246; WISCONSIN STAT. (1941) §233.13.

[12]* Collins v. Carman's Ex'r, 5 Md. 503 (1854) (Statute required renunciation within six months, and widow lived on the land for four years.); Moore v. Gordon, 85 N. J. Eq. 150, 95 Atl. 983 (1915); *see* Lee v. Giles, 161 N. C. 541, 77 S. E. 852 (1913).

[13] Cox v. McBroom, 155 Kan. 2, 122 P. (2d) 185 (1942); Williams v. Campbell, 85 Kan. 631, 118 Pac. 1074 (1911); Collins v. Carmen's Ex'r, 5 Md. 503 (1854); Hoggard v. Jordan, 140 N. C. 610, 53 S. E. 220 (1906); *In re* Wilson's Estate, 297 Pa. 348, 147 Atl. 70 (1929); Appeal of Jackson, 126 Pa. 105, 17 Atl. 535 (1889).

and the executor or administrator of a deceased widow cannot dissent therefrom.[14]

But what affirmative acts constitute an election? Clearly, mere consent to the probate of a will does not amount to an election to take under it.[15] In North Carolina, at least, the qualification as executor or executrix does not amount to an election;[16] but once the will is offered for probate by the executor with full knowledge of his rights thereunder, there can be no later dissent.[17]* Still, if such acts are made without knowledge of the condition of the estate, if a dissent is made immediately upon discovery, the North Carolina court has held it to be valid.[18]*

Where election is provided for by statute,[19] it has been held that a strict compliance with the statute is essential;[20]* and acts which would otherwise constitute an election have no bearing on the case.[21]*

Such acts as constitute an election must be clear and unequivocal, and must clearly evince an intention to take under the will.[22] Hence, the acceptance by a widow of a "family allowance" provided for by statute and granted by the court "until further order" is merely a temporary provision for the widow's support, pending administration of the estate, and does not constitute an election.[23] Bare statements by a widow that certain legatees would take something under a will alone will not constitute an election.[24] Neither does the fact that a widow signed her husband's will, consenting to its terms, estop her from dissenting later.[25] Furthermore, mere occupancy of the family residence, which the widow is entitled to do until her allotment of dower—in and of itself—does not constitute an election.[26] This is especially true where there has been no occasion which calls for her assertion of it.[27]

[14] Note 13, *supra*.

[15] McGrath v. Quinn, 218 Mass. 27, 105 N. E. 555 (1914).

[16] *In re* Shuford's Will, 164 N. C. 133, 80 S. E. 420 (1913).

[17]* Treadway v. Payne, 127 N. C. 436, 37 S. E. 460 (1900) (Here the devisee assumed the duties as executor and offered the will for probate. The court held him estopped to elect later and accept the same property under a deed executed by the testator subsequent to making the will.); Mendenhall v. Mendenhall, 53 N. C. 287 (1860).

[18]* Simonton v. Howton, 78 N. C. 408 (1878) (Widow had served as executor for sixteen months.).

[19] Note 11, *supra*.

[20]* Williams v. Williams, 114 Fla. 733, 154 So. 835 (1934) (Statute required widow to dissent from will within one year after its probate. Therefore, the fraudulent act of her attorney in failing to file her dissent did not prevent the operation of the statute.).

[21]* Bullock v. Smith, 201 Iowa 247, 207 N. W. 241 (1926) (Statute required written notice of consent to will. Where a widow occupied the premises during her lifetime and gave no written notice, she made no election.).

[22] Merchant's Nat. Bank v. Hubbard, 222 Ala. 518, 133 So. 723 (1931).

[23] Dick v. Glenn, 218 Ind. 282, 31 N. E. (2d) 1009 (1941).

[24] Note 22, *supra*.

[25] Tavel v. Guerin, 119 Fla. 624, 160 So. 665 (1935).

[26] Note 22, *supra*.

[27] Archer v. Barnes, 149 Iowa 658, 128 N. W. 969 (1910).

The filing of a suit by a widow and the heirs of a testator to set aside a testamentary trust as invalid does not constitute a dissent from the provisions of the will within the statutory period.[28] On the other hand, the Virginia court has held that a widow who acted as executrix of her husband's will, was not estopped to dissent therefrom merely because she unsuccessfully contested a claim of deed of trust indebtedness on her husband's estate.[29] Neither would a widow's request to withdraw administration of her deceased husband's estate be construed as a renunciation to take under his will where she actually possessed the property.[30] But where the action at law results in an absolute assertion of title under the will, there is indicated an intention to make an election.[31] Furthermore, an election against interest conferred by the will may result in the same decision.[32*]

As indicated above, few singular acts on the part of the devisee or legatee will result in an election; but add together two or more of the above or similar acts, and usually the courts hold a valid election to have been made.[33*]

In the principal case the court held that there was no obligation on the part of the defendant to make an election, and the mere fact that she requested the appointment of an administrator *c. t. a.* was insufficient to estop her from renouncing her rights under the will. But she did make a valid renunciation of her rights under the will by the filing of the petition with the Clerk of Court, which clearly and unequivocally set out her intention. It is submitted that the decision of the court is correct.

CECIL J. HILL.

[28] Story v. First Nat. Bank & Trust Co. in Orlando, 115 Fla. 436, 156 So. 101 (1934).

[29] Liverman v. Lloyd, 159 Va. 565, 166 S. E. 475 (1932).

[30] Peter v. Peter, 343 Ill. 493, 175 N. E. 846 (1931).

[31] Davis v. Badlam, 165 Mass. 248, 43 N. E. 91 (1896).

[32*] Smith v. Furnish, 70 Cal. 424, 12 Pac. 392 (1886) (Suit for services rendered to a testator is an election not to claim a legacy in payment of said services.).

[33*] McWorther v. Green, 111 Ark. 1, 162 S. W. 1100 (1914) (Wife held an estate by the entirety with her husband. He devised the whole property to his son in consideration that his son support his mother for life. The mother lived with the son until her death without claiming any interest in the land and with the knowledge that the son claimed it under the will. These acts precluded the heir of the mother from asserting any title in the property.); Appeal of Baker's Estate, 170 Okla. 595, 41 P. (2d) 640 (1935) (Widow's acts in offering her husband's will for probate, consenting to act as executrix, giving notice to creditors, filing inventory, paying bequests, seeking credit therefor in her account, filing and having the court approve her final accounts, and exonerate her bond—all without dissatisfaction with the will, constituted an election to take under the will.); *In re* Melot's Estate, 231 Pa. 520, 80 Atl. 1051 (1911) (Husband as executor of his wife's will filed an account in which he claimed credit for money paid for his wife's funeral expenses as provided by will; he also asked the court to distribute in exact accordance with provisions of the will, which excluded a legacy to himself. The court held this to be an election.); Borden v. Ward *et al.*, 103 N. C. 173, 9 S. E. 300 (1899) (Use of property and conveyance thereof constituted an election.).